

SERVED: October 27, 1993

NTSB Order No. EA-4003

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 15th day of October, 1993

DAVID R. HINSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-11778
v.)	
)	
ROBERT M. SCOTT,)	
)	
Respondent.)	
)	

OPINION AND ORDER

Respondent and the Administrator have appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on November 20, 1991, following an evidentiary hearing.¹ The law judge found that respondent had violated 14 C.F.R. 91.31(a) and 91.9.² The law judge reduced the Administrator's

¹The initial decision, an excerpt from the hearing transcript, is attached.

²§ 91.31(a), Civil aircraft flight manual, marking, and

proposed sanction from a 60 to a 15-day suspension of respondent's airline transport pilot certificate. We grant respondent's appeal and deny that of the Administrator. Accordingly, we dismiss the Administrator's complaint.³

The basic facts are not in dispute. Respondent was pilot-in-command of Hawaiian Air's Flight 840 on July 8, 1988. The charter DC-8 took off, near capacity, from Honolulu International Airport destined for Frankfurt, Germany. Approximately 200 miles out, while the aircraft was still in contact with Honolulu air traffic control (ATC), ATC contacted respondent and informed him that Hawaiian Air's dispatch was directing him to return to Honolulu. After initiating the turn-around, respondent contacted his dispatcher for further details, an exercise that took some time.⁴ Dispatch had no information other than that the order had

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placard requirements (now 91.9(a)), read:

(a) Except as provided in paragraph (d) of this section, no person may operate a civil aircraft without complying with the operating limitations specified in the approved Airplane or Rotorcraft Flight Manual, markings, and placards, or as otherwise prescribed by the certificating authority of the country of registry. . . .

§ 91.9(a) (now 91.13(a)) provided:

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

³The Administrator has also filed a motion to strike various material in respondent's appeal. We grant the motion, as the material is new evidence and respondent fails to justify receipt of it at this time. See 49 C.F.R. 821.49.

⁴According to the un rebutted evidence, respondent was unable to make contact with the dispatcher until 10 minutes prior to landing. Tr. at 188.

initiated with maintenance personnel. Respondent requested that dispatch obtain further details, but he received none prior to landing. On landing, respondent learned that maintenance believed, incorrectly as it turned out, that the aircraft was missing batteries necessary to operate the inertial navigation system.

Respondent admits that the aircraft was approximately 30,000 lbs. above its maximum landing weight. Tr. at 152. The landing was uneventful, however, and neither respondent's walkaround or maintenance's review uncovered any defects as a result of it. Respondent entered the overweight landing in the aircraft's log and the unrebutted testimony indicates that he filed a written report with the airline. Tr. at 164-165.

As noted, § 91.31(a) required that operations be in accordance with the aircraft manual. The Administrator demonstrated that the aircraft landed overweight, thus in violation of the manual. Nevertheless, the parties agree that the pilot-in-command has leeway to deviate from the manual in the event of an emergency. The questions raised in this case involve what the pilot must do to assert this emergency authority and how much leeway this authority gives him. That is: 1) was there an emergency that justified respondent's failure to lower the aircraft's landing weight by dumping fuel; and 2) if so, were respondent's actions a reasonable and measured reaction to the circumstances?⁵

⁵Respondent contends that, at the hearing, the Administrator

1. Was there an emergency? We reject the Administrator's suggestion that there can be no emergency other than one that requires "immediate" action, and that no immediate action was required here. See Administrator v. Owen, 3 NTSB 854 (1977) (emergency found although, in hindsight, no abrupt action by respondent was required). Although the law judge found that respondent believed there was an emergency (Tr. at 250-252), he also found that an emergency did not exist "to the degree as to excuse not having declared an emergency or assuring that an emergency had been declared on his behalf by dispatch" Tr. at 254. The law judge faulted respondent, not for operating beyond the aircraft's specifications, but for failing to declare an emergency so that the airport could properly prepare for what could be an emergency crash landing. We agree that respondent had a reasonable basis for believing that an emergency existed, but do not fault respondent for failing to declare an emergency.

The airline's flight operations manual, Exhibit R-1, provides:

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took the position that, because respondent did not formally declare an emergency, he could not take advantage of his emergency powers. The Administrator denies taking such a position. In any case, this is not the law. There is no support for this proposition in the rule itself, and Administrator v. Clark, 2 NTSB 2015 at footnote 8, holds otherwise in framing the issue as whether an emergency legitimately exists.

Further, whether the pilot declares an emergency is often used as circumstantial evidence of whether the emergency existed. The ultimate question to be answered is whether the situation is of such concern that responsive actions inconsistent with the aircraft's operating specifications or the Federal Aviation Regulations (FAR) are justified.

Any condition which requires the implementation of special procedures not normally utilized in flight operations, either by the flight crew or dispatcher, shall constitute an emergency. An emergency shall be considered to exist under any of the following conditions:

1. Any condition which necessitates an unscheduled or immediate landing at any airport.

[numbers 2-3 omitted]

4. The existence of any condition which tends to jeopardize the safety of a flight, as determined by either the pilot-in-command or dispatcher.

Respondent testified to his belief that, in light of these provisions, especially ¶ 1, an emergency situation was in effect. Tr. at 179-180. Further, respondent testified, unrebutted, that he was unable to obtain more information about the reason for his return to Honolulu, despite his attempt to do so. (The Administrator's suggestion that respondent did not persist in his quest for information is not at all supported in the record.) When the flight manual termed this situation an emergency and respondent was unable to determine why the flight was being recalled to Honolulu, we cannot on this record find that respondent erred in treating this situation as an emergency.

2. Were respondent's actions reasonable? We disagree with the law judge's conclusion that respondent should not receive the benefit of the emergency exception because he failed to ensure that the airport knew of the emergency. Respondent believed that dispatch had already apprised ATC of the situation. Tr. at 163.⁶

⁶Respondent assumed, since dispatch had talked to ATC, and the same controller had given him his clearance to return, that ATC knew as much as he did and that there was no need to repeat

In the circumstances, respondent should not, we think, be faulted for believing that ATC knew of the situation.

The evidence also does not support a finding that respondent failed to take reasonable steps to clarify the situation and avoid an excessive reaction. Indeed, the Administrator does not suggest how respondent might timely have obtained the clarifying information he unsuccessfully sought.

We recognize that it could also be argued that, absent advice of a serious threat to the aircraft's safety, respondent should have dumped the excess fuel prior to landing. However, safety concerns being paramount, we will not, with the benefit of hindsight, fault his actions. Indeed, even the FAA's instructions on the matter do not require fuel dumping, do not clearly prefer it to overweight landings, and extend the greatest discretion to the pilot.⁷

Importantly, the record demonstrates that the flight crew performed a thorough analysis of the implications of an overweight landing vis-a-vis fuel dumping.⁸ Respondent

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it to them. In contrast, both the Administrator and the law judge appear to assume that ATC knew nothing of the situation. The Administrator did not prove that assumption. All the Administrator offered was testimony from the ATC supervisor at the time that he was not aware of the details.

⁷See Exhibit R-2, "Policy on fuel dumping versus overweight landing." This document illustrates the competing concerns. It acknowledges that the pilot-in-command is "the only person in a position to make a final determination as to the safest course of action" and that "compliance with performance requirements of the FAR is not a primary consideration in an emergency." It offers aircraft handling information for overweight landings.

⁸Respondent was familiar with the fuel dumping procedure,

testified, un rebutted, that this was extremely light, as overweight landings go, and he established that conditions for the landing were excellent and met those prescribed in the flight manual by wide margins. Tr. at 152-160 and Exhibits R-3-R-5.⁹ Respondent felt that, not knowing exactly what was wrong, an overweight landing was necessary, as dumping fuel would add 30 minutes to the flight. Tr. at 184.¹⁰

Respondent otherwise complied with regulatory requirements in the event of an emergency.¹¹ Dispatch was informed and respondent testified that he sent a written report through the air carrier's operations manager. There is no indication in the record whether a report was received by the Administrator, as required, but we do not perceive this to be respondent's obligation under the rule, as written.

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having used it in the past.

⁹Exhibit R-4 indicates that overweight landings can be performed up to the aircraft's takeoff weight.

¹⁰"The problem was unknown to me. As I stated earlier. it could've been anything from a bomb to contaminated fuel. But whatever it was it was important enough for dispatch to call the Honolulu Center to turn this plane around." Tr. at 168-169. We will not second guess, in hindsight, assumptions respondent could have made, especially when we cannot find that his maneuver was riskier than necessary.

¹¹See 14 C.F.R. 121.557(c): "Whenever a pilot in command or dispatcher exercises emergency authority, he shall keep the appropriate ATC facility and dispatch centers fully informed of the progress of the flight. The person declaring the emergency shall send a written report of any deviation through the air carrier's operations manager, to the Administrator. A dispatcher shall send his report within 10 days after the date of the emergency, and a pilot in command shall send his report within 10 days after returning to his home base."

Having determined to dismiss the complaint, respondent's procedural arguments and the Administrator's appeal (seeking reinstatement of the 60-day suspension) are moot.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's motion to strike is granted; and
2. The Administrator's complaint is dismissed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.